LIBRARY
SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
MAY 8 1958
JOHN T. FEY, Clerk

No. 889

# In the Supreme Court of the United States

OCTOBER TERM, 1957

SIMON JACKSON, PETITIONER

*v.*

ALLEN INDUSTRIES, INC.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN OPPOSITION

**J. LEE RANKIN,**
*Solicitor General,*
**GEORGE COCHRAN DOUB,**
*Assistant Attorney General,*
**SAMUEL D. SLADE,**
**HERSHEL SHANKS**
*Attorneys, Department of Justice,*
*Washington 25, D. C.*

# In the Supreme Court of the United States

OCTOBER TERM, 1957

---

No. 889

SIMON JACKSON, PETITIONER

*v.*

ALLEN INDUSTRIES, INC.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

---

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN OPPOSITION**

---

**OPINIONS BELOW**

The opinion of the Court of Appeals for the Sixth Circuit (Pet. App. 1a–2a), is reported at 250 F. 2d 629. The opinion of the district court (Pet. App. 3a–6a) is unreported.

**JURISDICTION**

The judgment of the Court of Appeals was entered on January 2, 1958. The petition for a writ of certiorari was filed on April 2, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

**QUESTION PRESENTED**

Whether the Attorney General may, by regulation, withdraw from his subordinates authority to release

departmental files in response to a subpoena *duces tecum*.

**ORDER INVOLVED**

Department of Justice Order No. 3229, 18 F. R. 1368 is printed in the Appendix to the petition (Pet. App. 7a).

**STATEMENT**

This suit was instituted by the petitioner to recover damages resulting from respondent's alleged willful and malicious interference with petitioner's employment relationship (R. 4–5). The Government was not a party. The substance of petitioner's complaint is that respondent, petitioner's former employer, willfully and maliciously interfered with petitioner's employment relationship with the United States by giving false information concerning his loyalty to the Federal Bureau of Investigation, as a result of which petitioner was dismissed from his Government job [1] (R. 4–5).

In the course of the litigation, a subpoena *duces tecum* dated October 25, 1955, was directed to Herbert Brownell, Jr., Attorney General of the United States, and Charles W. Brown, Special Agent In Charge, Federal Bureau of Investigation, Detroit, Michigan (R. 102–103). The subpoena addressed to Mr. Brownell and Mr. Brown commanded them to appear at a stated time to testify on behalf of petitioner and to bring with them the file or group of files contain-

[1] The complaint also contained two additional counts, one for breach of an employment agreement and another for defamation (R. 2–4). However, these counts were dismissed at the end of petitioner's affirmative case (R. 169) and no appeal was taken from this ruling.

ing information given by respondent or its employees to the F. B. I. with reference to petitioner (R. 102). The subpoena was never served on Herbert Brownell, Jr. (R. 106, 108–109). The United States Attorney, on behalf of the F. B. I. agent, moved to quash the subpoena *duces tecum* on the basis of Department of Justice Order No. 3229, 18 F. R. 1368 (R. 105–107). This order (Pet. App. 7a) provides that subordinate officers of the Department of Justice are not authorized to release or produce files of the Department of Justice and that, when served with a subpoena *duces tecum,* the United States Attorney is to appear on behalf of the official served with the subpoena and respectfully direct the court's attention to the order. In support of the motion to quash, the United States Attorney submitted a letter he had received from then Assistant Attorney General Burger advising that the Attorney General had reviewed the question presented by the issuance of the subpoena in this case and had decided to invoke the claim of privilege as to the documents and information referred to in the subpoena (R. 107–108). The letter concluded by requesting the United States Attorney to inform the court that the subpoenaed official was not authorized to produce the documents and files (R. 107–108). On December 30, 1955, the subpoena *duces tecum* served on Charles W. Brown was quashed (R. 108–109.[2]

[2] Petitioner filed a motion in the Court of Appeals for the Sixth Circuit for leave to file a petition for a writ of mandamus or certiorari directing the district court to set aside the order quashing the subpoena. The Court of Appeals ruled that the quashing of the subpoena was nothing more than an evidentiary ruling and that the correctness of the ruling must await review by appeal after final judgment (R. 109–110).

On July 23, 1956, a subpoena *duces tecum* substantially identical to the one just described was again directed to and served on Charles W. Brown (R. 103–104). Again the Government moved to quash the subpoena *duces tecum* on the same grounds as the earlier motion (R. 16–17). On this occasion, the court refused to compel obedience to the subpoena (R. 22, 59–60).

After a full trial on the merits before the district court sitting without a jury, the action was dismissed (R. 24). In its opinion dismissing the action, the court reaffirmed its refusal to compel Mr. Brown to produce the subpoenaed documents and files (Pet. App. 3a–6a). On the merits, the court found that the petitioner had "fallen far short of proving his case" (Pet. App. 6a). Moreover, the court also found that this failure of proof could not be remedied by the files and documents sought by the subpoena because the statements allegedly made by the respondent could not have been made with the intention of interfering with petitioner's employment relationship with the United States, since he had not yet been employed by the Government at the time the statements were made (Pet. App. 5a–6a).

On appeal, the Court of Appeals for the Sixth Circuit ruled *per curiam* that the district court correctly refused to compel compliance with the subpoena *duces tecum*. The Court of Appeals also affirmed the district court's ruling on the merits.

## ARGUMENT

In his petition for certiorari, petitioner argues only that the subpoenaed documents are not privileged.

However, the scope of governmental privilege is not a question which is open on this record. Whether particular departmental files are privileged may not be tested by serving a subordinate official who, by valid regulation, has no authority to produce *any* departmental files, and who, in legal contemplation, is not the custodian of the documents. The Attorney General is the custodian of the documents and is the official under whose instructions the F. B. I. agent refused to produce. However, the Attorney General was not served with the subpoena. Thus, the propriety of his action in invoking the privilege is not before the Court. The only question presented here is the validity of the Attorney General's order withdrawing from his subordinates authority to release departmental papers and, in *Touhy* v. *Ragen,* 340 U. S. 462, a case on all fours with the instant case, this Court ruled that the order here in question is valid.

In the *Touhy* case, an F. B. I. agent was served with a subpoena *duces tecum* in a habeas corpus proceeding brought by a prisoner against his warden. Production was refused on the basis of Department of Justice Order 3229 prohibiting subordinate officials of the Department from releasing departmental files.[3] This Court ruled that the F. B. I. agent properly refused to produce the documents and found it unnecessary "to consider the ultimate reach of the authority of the Attorney General to refuse to produce at a

[3] This order is the same order involved in this case, although, since the decision in the *Touhy* case, it has been revised in respects not here material. *Cf.* 11 F. R. 4920 *with* 18 F. R. 1368.

court's order the government papers in his possession, for the case as we understand it raises no question as to the power of the Attorney General himself to make such a refusal. The Attorney General was not before the trial court" (340 U. S. at 467). The Court limited its examination "to what this record shows, to wit, a refusal by a subordinate of the Department of Justice to submit papers to the court in response to its subpoena *duces tecum* on the ground that the subordinate is prohibited from making such submission by his superior through Order No. 3229. The validity of the superior's action is in issue only insofar as we must determine whether the Attorney General can validly withdraw from his subordinates the power to release department papers." (*Ibid.*)

The Court then found that the order was a valid exercise of authority under 5 U. S. C. 22,[4] stating:

> * * * When one considers the variety of information contained in the files of any government department and the possibilities of harm from unrestricted disclosure in court, the usefulness, indeed the necessity, of centralizing determination as to whether subpoenas *duces tecum* will be willingly obeyed or challenged is obvious. * * * [340 U. S. at 468.]

It is thus clear that *Touhy* v. *Ragen* is dispositive of the case at bar, and that the courts below correctly

---

[4] 5 U. S. C. 22 provides as follows:

> The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it.

disposed of the question of Brown's refusal to respond to the subpoena *duces tecum.*[5] Accord, *Boske* v. *Comingore,* 177 U. S. 459 and *Appeal of the United States Securities and Exchange Commission,* 226 F. 2d 501 (C. A. 6), both sustaining the validity of similar orders in other agencies and ruling that in similar circumstances the validity of the order was the only question presented by the record. See also, *Ex parte Sackett,* 74 F. 2d 922 (C. A. 9); *In re Valecia Condensed Milk Co.,* 240 Fed. 310 (C. A. 7); *Stegall* v. *Thurman,* 175 Fed. 813 (N. D. Ga.); *In re Weeks,* 82 Fed. 729 (D. Vt.); *Harwood* v. *McMurtry,* 22 F. Supp. 572 (W. D. Ky.); *Walling* v. *Comet Carriers, Inc.,* 3 F. R. D. 442, 443 (S. D. N. Y.).

---

[5] Petitioner's passing suggestion (Pet. 11) that the authority of the *Touhy* case has been weakened by *United States* v. *Reynolds,* 345 U. S. 1, is without support in the *Reynolds* case itself. The *Reynolds* case involved the Government's privilege to resist discovery in a case in which it was a party. The motion for production of documents under Rule 34 of the Federal Rules of Civil Procedure was served on the United States and, thus, the question of privilege was squarely raised. See *Reynolds* v. *United States,* 192 F. 2d 987, 992–993 (C. A. 3). This Court ruled that the documents in question were privileged. Since the scope of the Government's privilege is not properly in question here, the *Reynolds* case is inapposite.

## CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for certiorari should be denied.

J. LEE RANKIN,
*Solicitor General.*
GEORGE COCHRAN DOUB,
*Assistant Attorney General.*
SAMUEL D. SLADE,
HERSHEL SHANKS,
*Attorneys.*

MAY 1958.

U. S. GOVERNMENT PRINTING OFFICE: 1958

# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Question presented | 1 |
| Order involved | 2 |
| Statement | 2 |
| Argument | 4 |
| Conclusion | 8 |


## CITATIONS


| | |
|---|---|
| Cases: | |
| *Appeal of the United States Securities and Exchange Commission*, 226 F. 2d 501 | 7 |
| *Boske* v. *Comingore*, 177 U. S. 459 | 7 |
| *Harwood* v. *McMurtry*, 22 F. Supp. 572 | 7 |
| *Sackett, Ex parte*, 74 F. 2d 922 | 7 |
| *Stegall* v. *Thurman*, 175 Fed. 813 | 7 |
| *Reynolds* v. *United States*, 192 F. 2d 987 | 7 |
| *Touhy* v. *Ragen*, 340 U. S. 462 | 5, 6 |
| *United States* v. *Reynolds*, 345 U. S. 1 | |
| *Valecia Condensed Milk Co., In re*, 240 Fed. 310 | 7 |
| *Walling* v. *Comet Carriers, Inc.*, 3 F. R. D. 442 | 7 |
| *Weeks, In re*, 82 Fed. 729 | 7 |
| Statute: | |
| 5 U. S. C. 22 | 6 |
| Miscellaneous: | |
| 11 F. R. 4920 | 5 |
| Department of Justice Order No. 3229, 18 F. R. 1368 | 2, 3, 5, 6 |